of the state's right to appeal the sentence. However, the principal reason that the courts below found counsel ineffective was for his complete failure to consider, when advising Respondent to plead guilty as charged, that there was the additional risk of a state appeal. The state oversimplifies the rulings below in order to establish a false premise on which to base its new argument.

The state's argument here was not raised in the state courts or in the District Court, but for the first time in the Sixth Circuit. Nor did the Michigan Court of Appeals, the last state court to address the merits, employ this rationale. The state claims (1) that a defendant need only be advised of the direct, as opposed to collateral, consequences of a guilty plea; (2) the prosecutor's right to appeal the sentence in the same case is a collateral consequence; and (3) therefore it cannot have been ineffective for counsel to fail to consider that risk or advise Respondent of it. This argument is without merit.

The Sixth Circuit correctly rejected this argument for the following reasons, at 299 F3d 596-597:

> Relying on a string of circuit court cases, the warden argues that defense counsel's failure to inform Lyons of the prosecution's right to appeal the imposition of a juvenile sentence does not comprise ineffective assistance because the prosecutor's right of appeal represents a collateral, as opposed to a direct, consequence of the plea. We reject this argument on two grounds.
>
> First, the warden's reliance on circuit court cases is improper. The AEDPA prohibits use of lower court decisions in determining whether the state court decision is contrary to, or is an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 (defining "clearly established law as determined by the Supreme Court" to mean holdings of Supreme Court decisions); *Harris*, 212 F.3d at 944 (holding district court erred in "rely[ing] on authority other than that of the Supreme Court of the United States in its analysis under § 2254(d)").
>
> Second, the warden's argument is incompatible with Supreme Court case law. The Court does not use a direct/collateral consequence categorization scheme to decide ineffective assistance of counsel claims. Indeed, in *Hill*, the Supreme Court reviewed

> an Eighth Circuit decision holding that parole eligibility was not a "direct consequence" of a guilty plea. See *Hill v. Lockhart*, 731 F.2d 568, 570-73 (8th Cir.1984). The Court noted this holding, but eschewed any such characterization in favor of directly applying *Strickland* to the plea context. *Hill*, 474 U.S. at 55, 57-60, 106 S.Ct. 366. ***As the Court stated in Williams: "the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims."*** 529 U.S. at 391, 120 S.Ct. 1495. (Emphasis added.)

Assuming, without conceding, that the state's right to appeal the sentence in this case is a collateral rather than direct consequence of the plea, the state's argument still fails. Numerous cases from the lower courts have found counsel ineffective ***even if*** the consequence which counsel fails to consider (or on which counsel offers erroneous advice) is collateral. The cases cited by the state do not provide support for the bright line rule the state asks this Court to adopt.

As the Sixth Circuit noted here, in *Hill v Lockhart, supra*, the Supreme Court decided the case on procedural grounds but declined to reach the merits of Hill's claim that he was denied the effective assistance of counsel for counsel's misadvice that he would be eligible for parole in six years, rather than the actual nine years he was facing. Hill filed a second habeas petition raising that issue, and the Eighth Circuit affirmed the District Court's grant of habeas relief on those grounds, *Hill v Lockhart*, 877 F2d 698, (CA8, 1989). An *en banc* Eighth Circuit affirmed the panel decision. *Hill v Lockhart, en banc*, 894 F2d 1009 (CA8, 1990). Although parole consequences are considered collateral consequences of a guilty plea, and "not every instance of a lawyer's failure to inform a client accurately of parole eligibility will reach the level of a constitutional violation", *Id.* at 894 F2d 1010, Hill nonetheless was granted habeas relief.

Numerous courts have recognized the same principle, that even though parole consequences are "collateral", a defendant may be entitled to habeas relief if counsel provides information which proves to be sufficiently erroneous and defendant can show that he would not have pled guilty in the

absence of the erroneous information. *Meyers v Gillis*, 142 F3d 664, 666 (CA3, 1998); *Sparks v. Sowders*, 852 F2d 882, 885 (CA6,1988); *Czere v Butler*, 833 F2d 59, 63 n. 6 (CA5, 1987); *O'Tuel v Osborne*, 706 F2d 498, 500-01 (CA4, 1983); *Cepulonis v Ponte*, 699 F2d 573, 577 (CA1, 1983); *Strader v Garrison*, 611 F2d 61, 65 (CA4, 1979). The state's argument that the direct/collateral distinction is a bright line rule precluding a finding of ineffective assistance in cases where counsel's error is on a "collateral" consequence is without merit.

Two cases cited by the District Court but not even addressed by the state are consistent with this analysis. In *Wogan v United States*, 846 F Supp 135 (D ME, 1994), the District Court found counsel ineffective for failing to inform the defendant that the Government could appeal a downward departure from the Sentencing Guidelines range. *Wogan* is closely analogous to this case, in that counsel's failure to consider the potential consequences of a prosecution appeal by right of the sentence led the defendant to make an uninformed choice. Wogan's uninformed choice was to not testify at his original sentencing hearing on the amount of cocaine attributable to him as relevant conduct under the Guidelines. That choice led to similar consequences as did Lyons' uninformed choice here, a much harsher sentence on remand after the prosecution's successful appeal of the sentence, though the consequences were much crueler for Lyons: life without parole without benefit of a trial in a case where he had defenses of excuse and mitigation.

Also cited by the District Court was *State v Goforth*, 130 NC App 603 (1998), a decision which rests on a line of Fourth Circuit cases. *Goforth* presents a flip side of the issue here: counsel erroneously informed the defendant that after her guilty plea, she could appeal her sentence. The Court noted that North Carolina courts had not previously decided whether erroneous advice concerning the appealability of a sentence could amount to ineffective assistance of counsel, but

upon reviewing several Fourth Circuit cases where erroneous advice had been found to constitute ineffective assistance, the Court concluded that the answer was that such misadvice clearly could be ineffective. The Fourth Circuit cases were *Strader v Garrison*, 611 F2d 61, 65 (CA4, 1979) (misinformation about defendant's parole eligibility; *Ostrander v Green*, 46 F3d 347 (CA4,1995) (misinformation about defendant's eligibility for work release); *United States v Foster*, 68 F3d 86 (CA4, 1995) (misinformation about defendant's sentencing status).

Contrary to the state's argument, a lawyer's mistake about collateral consequences of a guilty plea clearly can amount to ineffective assistance of counsel. Although most of the cases deal with erroneous advice, *Wogan* makes clear what should be obvious, namely that when a lawyer ***fails to consider*** significant consequences in advising a client to plead guilty, he is exercising no more constitutionally effective judgment than the lawyer who gives erroneous advice.

The cases cited by the state regarding the direct/collateral consequence rule are completely beside the point. The state overstates the rule, failing to recognize the cases discussed above. The denial of relief in the cases cited by the state was due in each case to circumstances not comparable to this case. [3] The state's argument for a *per se* rule that the failure of defense counsel to consider

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[3] In *King v Dutton*, 17 F3d 151, 154(CA6, 1994), the defendant was denied relief where he claimed he should have been advised that pleading guilty in one case could have aggravating consequences in sentencing on ***another, unrelated*** case. In *Parry v Rosenmeyer*, 64 F3d 110 (CA3, 1995), the defendant was denied relief where he claimed that his plea was unknowing and involuntary, because he should have been advised that if he were sentenced to probation, his probation could be revoked if he ***later*** violated it and a term of imprisonment substituted in its place. In *United States v Campusano*, 947 F2d 1, (CA1, 1991) the defendant was denied relief on his claim that a state court guilty plea was involuntary because defendant was not aware it could be used against him in a ***subsequent*** federal prosecution. In *United States v Brownlie*, 915 F2d 527 (CA9, 1990), the defendant was denied relief on a claim that he should have been advised that if he committed ***another crime in the future***, the crime to which he pled could be used to enhance the sentence on the future conviction. In *United States v Campbell*, 778 F2d 764 (CA11, 1985), and *United States v Gonzalez*, 202 F3d 20 (CA1, 2000) the defendants were

or to advise Respondent that the state could appeal his sentence cannot possibly constitute ineffective assistance is without merit.

The Sixth Circuit correctly found that counsel was ineffective for failing to even consider the risks in a state appeal of the sentence in advising Respondent to plead guilty, and that as a consequence Respondent did not understand all of the risks he was taking by pleading guilty:

> However, Lusby acted incompetently in failing to consider the likelihood that the prosecutor would exercise his right to appeal the district court's imposition of a juvenile sentence. Any juvenile sentence imposed on Miller would be less than six years in a juvenile facility. ***Given such a lenient sentence for first degree murder, it was unreasonable for Lusby not to have considered that the prosecutor could appeal and the juvenile sentence could be reversed. Yet Lusby did not factor this scenario into his advice to Miller that pleading guilty was in Miller's best interest.*** Thus, Miller did not know that the prosecutor could appeal and that the juvenile sentence could be reversed, and, if so, Miller would serve a life sentence without possibility of parole.
>
> Lusby should have considered these possibilities, informed Miller about them, and incorporated them into his risk assessment when he advised Miller about pleading guilty. He failed to do so. Rather, he advised Miller to plead guilty based solely upon his assessment of the relative risks in going to trial versus pleading guilty before Chief Judge Roberson. As a result, Lusby misinformed Miller regarding the likelihood he would receive an adult sentence. Miller was not fully apprised of the risks he faced.
>
> The duty of defense counsel to consult is paramount when a client has to decide whether or not to waive a constitutional right, such as the right to trial. Because the decision whether or not to plead guilty ultimately rests with the client, see *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594

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denied relief on claims that the failure to advise them of ***deportation*** consequences of their convictions rendered the pleas involuntary. In *Torrey v Estelle*, 842 F2d 234 (CA9, 1988), the defendant was denied relief where he claimed that the state court's failure to advise him at the time he pled guilty that ***he could be resentenced*** under state law if the later state determined that he could not be treated as a juvenile because of bad behavior, like attempting to purchase a gun through the mail while in juvenile custody.

(1977) (Burger, C.J., concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make"), counsel must ensure that the client's decision is as informed as possible. Failing even to consider, let alone notify the client of, a factor that could negate the entire benefit of the guilty plea is not within the range of professional norms.

Miller's age and his heavy reliance on Lusby, a reliance Lusby acknowledged was "practically total[ ]," enhanced Lusby's duty to make certain that Miller understood all the risks associated with his guilty plea. Miller was fifteen years old and a year behind in school. His parents, according to Lusby, were themselves reliant on Lusby for advice. ***This case epitomizes the criminal defendant's need for what the Supreme Court has called the "guiding hand of counsel at every step in the proceeding against him."*** *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

We conclude that Miller's trial counsel was incompetent. It is an objectively unreasonable application of *Hill* and *Strickland* for the Michigan Court of Appeals to hold otherwise. 299 F3d at 580-581. (Footnotes omitted.) (Emphasis added.)

With regard to the prejudice prong of *Strickland/Hill*, the Sixth Circuit correctly rejected the state's claim that Respondent was not prejudiced:

The wardens argue that Miller and Haynes could not have been prejudiced by any deficiency on the part of their trial counsel because they acknowledged at their March 1990 plea hearings that they could be sentenced to life imprisonment without parole. According to the wardens, "the fact that [Miller and Haynes] might not have been told that the prosecution could appeal [the juvenile] sentence [they were] never assured of receiving in the first place should be of no consequence."

The wardens maintain that if a defendant is aware of the maximum possible sentence he cannot be prejudiced by his counsel's failure to inform him of the prosecutor's right to appeal. We decline to adopt the wardens' argument. ***An awareness of the sentencing range available to the trial judge is not the same as an informed understanding that a sentencing judge's decision is subject to reversal. The rule suggested by the warden would preclude courts from finding prejudice in any situation where the defendant knew the range of penalties to which he was subject.***

Furthermore, the circumstances of these cases illustrate the failings of the wardens' argument. Miller and Haynes pled guilty in hopes of avoiding life imprisonment without parole. A reduced likelihood of being sentenced as an adult was the sole benefit of their guilty pleas before Chief Judge Roberson. In reality, the risk of being sentenced as an adult came in two parts: (1) being sentenced as an adult by Chief Judge Roberson; and (2) having received a juvenile sentence from Chief Judge

> Roberson, being subject to a successful appeal by the prosecutor. Miller and Haynes, however, each received from his attorney information of only the first risk. Defense counsel's failure to assess all the risks and inform Miller and Haynes left each of them to make the most important decision of his life without essential information. Presented with all the risks, Haynes and Miller might well have decided to plead not guilty and to take their chances at trial. To meet the prejudice requirement under *Hill* and *Strickland*, Haynes and Miller need only show a reasonable probability that they would have pled not guilty had their attorneys competently advised them.
>
> ***Miller puts forth additional evidence that, with competent assistance, he would have pled not guilty.*** Lusby testified that Miller pled guilty only reluctantly. The fact that Lusby had to prevail upon Miller to plead guilty tends to corroborate Miller's testimony that he would have pled not guilty had he known of the prosecutor's right to appeal. Lusby convinced Miller to plead, but did so without advising him of the full risk he faced of receiving a life sentence. This evidence shows that Miller would have been less likely to plead guilty had he been competently advised of all the risks. 299 F3d at 582-583. (Footnote omitted.) (Emphasis added.)

The state's arguments are without merit. The petition for a writ of certiorari should be denied.

II. THE SIXTH CIRCUIT DID NOT GIVE THE STATE APPELLATE DECISION INSUFFICIENT DEFERENCE, NOR DID IT DECIDE THIS CASE AS THOUGH IT WERE ON DIRECT REVIEW.

The sole issue in this case is one of ineffective assistance of counsel in circumstances unique because of state law regarding the charging and sentencing of juveniles as adults. The state argues this Court should grant certiorari to refine this Court's jurisprudence regarding the AEDPA on two issues. Neither of those issues are truly present in this case.

The state requests that certiorari be granted so that this Court can give guidance to the lower courts on the degree of deference due a state decision which does not cite controlling federal authority. This issue does not merit certiorari.

In this issue, the state rehashes the dissenting opinion in the Sixth Circuit and attempts to create a tension where one does not really exist. The state claims that the Sixth Circuit did not give adequate deference to the state appellate decision, because the concurring judge noted this was a close case, and by definition a close case cannot be objectively unreasonable. This claim takes language of the concurring opinion out of context and assumes that the concurring judge, a very experienced member of the Sixth Circuit, is unfamiliar with this Court's AEDPA jurisprudence. Judge Gilman, concurring, said:

> I fully concur with the lead opinion's conclusion that Lyons's counsel was constitutionally ineffective because of the lawyer's failure to inform Lyons that the state could appeal the decision of the trial judge to sentence him as a juvenile. My reason for writing separately is to explain, in what I regard as an extremely close case, why I find the well-written dissenting opinion less persuasive than the lead opinion. 299 F3d at 601.

Judge Gilman is familiar with current habeas corpus law. When he said he regarded this as a close case, he clearly meant "close" applying the proper standard of review. This does not lead to

the conclusion the state draws, namely that the Sixth Circuit majority dealt with this case as though it was dealing with a case on direct review. The majority opinion expressly noted that it was applying *Williams*, 299 F3d at 577-578, and also that while the state court had not cited *Strickland* or *Hill*, it had applied the law of those cases, and it was applying *Williams v Taylor*:

> Although the Michigan Court of Appeals did not mention either *Hill* or *Strickland* by name, it did apply the law of those cases. Thus, we must examine whether that court applied *Hill* and *Strickland* unreasonably. 299 F3d at 578.

This issue does not merit a grant of certiorari.

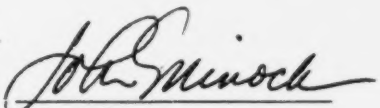
III. THIS COURT DOES NOT NEED TO RECONSIDER WILLIAMS V TAYLOR IN ORDER TO REDEFINE REASONABLENESS UNDER THE AEDPA.

The state argues that *Williams v Taylor* provides an inadequate definition of unreasonableness under the AEDPA and that this Court should revisit *Williams v Taylor* standard and consider adoption of the "any rational jurist" test, which this Court rejected there. Respondent submits there is no reason to do that in this case. This Court does not sit to issue advisory opinions or decide abstract questions not posed by an actual case in controversy. The only controversy posed in this case by the state is the claim that the dissent had the better of the argument. That does not merit certiorari.

SUMMARY AND RELIEF REQUESTED

WHERFORE, Respondent-Appellee Dashawn Lyons requests that this court deny the petition for a writ of certiorari.

Dated: December 27, 2002



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